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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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JIMMY WILLIAMS

Plaintiff

v. 11 CV 5202 (JGK)

THE CITY OF NEW YORK, RICHARD PENGEL, DANIEL EHRENREICH, CARLOS MATOS

Defendants

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New York, N.Y.
December 13 2012
11:00 a.m.

Before:

HON. JOHN G. KOELTL

District Judge

APPEARANCES

DARIUS WADIA LLC
Attorney for Plaintiff
DARIUS WADIA

NEW YORK CITY LAW DEPARTMENT
Attorneys for Defendants
MORGAN D. KUNZ
MELISSA WACHS

(In open court; case called)

MR. WADIA: For Mr. Jimmy Williams, Darius Wadia, 233 Broadway, New York, New York. Good morning, your Honor.

THE COURT: Good morning.

MR. KUNZ: For defendants, Pengel, Ehrenreich and Matos, Morgan Kunz. Good morning.

THE COURT: Good morning.

All right. This is the defendant's motion. I'm familiar with the papers. So, I am here to listen to argument.

MR. KUNZ: Thank you, your Honor.

We will start by addressing the malicious prosecution claim since that was briefed first. As laid out in our motion papers, we believe the claim is barred by the doctrine of absolute immunity. I can walk you through the argument in its most basic form. There is a presumption under New York State law that a grand jury indictment creates probable cause.

Because of the witness immunity in grand jury proceedings, plaintiff cannot rebut that presumption of probable cause, and, therefore, there is no valid malicious prosecution claim.

THE COURT: There has long been an exception to that claim if the indictment was procured in an improper way. And doesn't Judge Dearie's decision really come out the other way from you? Because the impact of your argument is plainly that, OK, if -- taking an extreme case -- the police formulate a

fraudulent case against a defendant. They create false evidence outside the grand jury room. They do false reports. They encourage the prosecutor to bring the indictment. The false evidence then gets presented to the grand jury in addition just to their testimony, and they have absolute immunity for their testimony, but an indictment then gets returned. And the officers have protected themselves from malicious prosecution because they've testified before the grand jury even though they created false evidence, had it presented to the grand jury, got the prosecutor to bring the indictment, one would think there would be a lot of policemen out there who would be begging to testify before the grand jury. I mean, one policeman wouldn't be enough. They'd all want to testify before the grand jury because this would be their free pass. And of course that goes way beyond the limited Supreme Court decision, and it does seem contrary to Judge Dearie's decision. So ...

MR. KUNZ: I guess my first observation is I believe you're referring to Judge Dearie's decision in *Sankar v. The City of New York*. That case is very distinguishable from the present one on the simple fact that there was no grand jury indictment in that case. The City of New York in that case was attempting to extend the holding in *Rehberg* to cover not the probable cause prong of a malicious prosecution claim but the initiation prong. And we were saying that plaintiff could not

meet his burden in showing that the officers initiated the prosecution without using the grand jury testimony for which they're immune, and Judge Dearie said, no, that's one step too far. That's not what *Rehberg* is about. The reason I think that's distinguishable here is because we're focusing on the probable cause prong of malicious prosecution.

Now, in regard to your question, I think the Supreme Court actually discussed this issue in the *Rehberg* decision --well, in the famous footnote two, but even beyond that when they were talking about the reason why -- one of the arguments against extending grand jury immunity to police officers, to government officials was that there would be no deterrent effect; that you needed the civil liability as a deterrent effect to prevent officers from doing the exact thing that you're talking about.

And the Supreme Court said that that interest was overcome, and that it was more important -- there was a greater interest in having witnesses be immune for their grand jury testimony to encourage frank, honest discussions with the jury.

THE COURT: But --

MR. KUNZ: So I think your extreme example, which obviously sounds like a very bad situation --

THE COURT: Sure does.

MR. KUNZ: -- the deterrent effect there is the fact that the prosecution would ultimately fail. And that police

officers -- this is what the Supreme Court says, police officers have an interest in seeing the prosecution that they initiate succeed, and, you know, prosecuting the person and the fact that the prosecution will fail based on perjured testimony is a sufficient --

THE COURT: How do we know that?

MR. KUNZ: I'm just saying this is what the Supreme Court said.

THE COURT: But the gist of the Supreme Court's decision was we want to protect police officers who testify before the grand jury because we want to have free and frank testimony before the grand jury and we're prepared to live with the risks of that.

MR. KUNZ: Right.

THE COURT: But the work outside the grand jury is not covered, except to the extent that it's simply a ruse to avoid the immunity for the testimony before the grand jury. So, if you say the police officers conspired to give false testimony before the grand jury or they conspired to have a false indictment returned, that that won't survive.

On the other hand, one of the things that makes this case troubling, if you will, is the testimony about recreating the scene, and, consequently, creating a photograph of where the evidence was found, and that certainly is odd.

Now, the record before me is not fully developed. I

say it's odd. Perhaps police do that all the time. You have more experience. You all are experts in this case. But to have the police take a car while it's in police custody and then to create photographs about where they say the drugs were as though that's a picture of where they found the drugs, which is, of course, not really what the photograph was doing. The photograph was saying, OK, we've created the incident at the station house, but a photo of the drugs there contrary to the testimony of plaintiff certainly creates the image of creating false evidence.

One would have thought that that's not the way in which you do it. One would have thought that if you take a picture of the drugs before you take them out of the car, that's fine. If you have photographs of the car, and you have photographs of the drugs, you're in a position to have people explain to the jury subsequently "Here's the car. Here's the drugs. Here's where I found the drugs" without creating a photograph showing the drugs in the car which the plaintiff says didn't happen.

MR. KUNZ: Absolutely. I understand what you're saying, your Honor, and from an evidentiary perspective -- and as we've laid out in our motion -- there's been no effort to suggest that the photo was taken at the scene before the drugs were touched at all by the officers.

THE COURT: How do I know that on this motion? And--

MR. KUNZ: The deposition testimony of the officer where he was very forthright about how he took those photographs and what he did leading up to those photographs. Part of it is a practical matter where officers don't have digital cameras that they're running around with. So the digital camera that he used was back at the precinct.

THE COURT: Does this happen all the time? I mean, this is not in the record. This goes surely beyond the record.

MR. KUNZ: I mean, honestly, I don't know that it does happen all the time. I don't know that this is a unique situation.

I do know that it's our position that these photographs are simply demonstrative of the officer's testimony, and that the officer needs to testify about where the drugs were found. You know, I guess your Honor's point is an interesting one. Might it have been better had he taken a photograph of the car and then the drugs separately and then sort of mixed in, said, "This is what I found them." You know, I'm not sure if that would have been better or worse, and I'm not sure it would change anything. We'd still have this question of fact, and the plaintiff would still be pointing to the testimony of the officer and saying, "That's a lie. When he says he found the drugs there, that's a lie."

So this is why we put in our motion papers we think that issue is a red herring, and we don't think that this is

really what the case turns on.

What the case turns on is did the officers find the drugs in this spot in the car, or, as plaintiff claims, did they find them in the pocket of his friend just outside the car? And as we laid out, that question is going to the jury in the false arrest claim. We'll have an answer to that question. We're confident that the jury will find for the defendants in that issue.

Our simple point is that when we're narrowing down claims, and when we're deciding what's going to be put to the jury, plaintiff has to prove his malicious prosecution claim and the grand jury indictment creates a problem for him.

THE COURT: So the case goes forward on false arrest claim, right?

MR. KUNZ: Correct.

THE COURT: And the issue is, does it also go forward on the malicious prosecution and the fair trial claim?

MR. KUNZ: Correct.

THE COURT: And all of the same evidence would go in, right?

MR. KUNZ: Right.

THE COURT: So your invitation is to pretrial cut out these claims and leave the issue on a narrow issue of law with sort of, as you can glean from my questions, breath-taking breath, leave those to the inevitable appeal rather than to ask

these questions of the jury which has to hear the same evidence anyway?

MR. KUNZ: Well, yes, exactly, your Honor. And I totally --

THE COURT: Why is that scenario not appealing?

MR. KUNZ: Well, there's a couple reasons. One is we get into a problem with damages where the bulk of the plaintiff's damages are the eleven days of incarceration following his being detained pursuant to legal process. And other than that, he's got I think it's a little less than 24 hours in custody as his damages.

So, if you put both claims to the jury and assume, let's say, plaintiff wins on both claims and they award damages for the full eleven days, the City appeals, and then we're going back, and let's say we win on appeal --

THE COURT: Why don't I divide damages up?

MR. KUNZ: Then you run the risk of double recovery.

THE COURT: No. Why don't I instruct the jury that they can't have double recovery? I do that all the time. You can't count damages twice. What are your damages under this claim? What are your damages under this claim? Because here the damages are segregable, right?

MR. KUNZ: That's our position, yes, is that damages following the arraignment are not recoverable on the false arrest claim.

THE COURT: Right. So you'd have damages for the false arrest claim and then you'd have damages for the malicious prosecution and fair trial claim.

MR. KUNZ: Right. And the malicious prosecution and fair trial claim would be the same damages.

THE COURT: So, that's easy.

MR. KUNZ: Well, we don't think it's quite that easy, and we think that any time you put two sections on the verdict sheet asking the jury to award two sums, you run the risk of double recovery. And we understand that you can give limiting instructions, but nevertheless we're concerned about that risk.

Obviously, your Honor's point here is well taken, and we understand what you're saying. I think our point is that we don't think the law is -- especially under the malicious prosecution issue, we don't think the law is that confusing where we would put it to the jury and then let the Second Circuit sort it out on appeal, or on post trial motions.

We think that for the malicious prosecution, the case law is very clear, and other than the Judge Dearie decision are the Eastern District, other judges that have looked at this, and the Southern District here, Judge Scheindlin especially, have held what we think is the correct holding: That in situations like this, the plaintiff cannot show that the grand jury indictment was procured through the officer's fraud and, therefore, the malicious prosecution claim cannot proceed.

I think Ms. Wachs wanted to make a few comments on the fabrication of evidence.

THE COURT: Can I just ask one other question?

MR. KUNZ: Sure.

THE COURT: I can't find, and maybe you can help me, the specific allegations against Officer Matos. On the other hand, there is no motion to dismiss Officer Matos for lack of any allegations of personal involvement. So it's not something I can decide on these motions because I have no motion to dismiss Officer Matos.

MR. KUNZ: Well, we thought of making that motion. We've actually asked Mr. Wadia to consider withdrawing the claims against Matos. You know, frankly, we would orally make that motion here to dismiss the claim against Matos. We don't think he is a particular player in this incident.

THE COURT: I don't know. I have no allegations against him. What was his alleged involvement?

MR. KUNZ: I can let Mr. Wadia speak about that. But what Mr. Matos himself says is that the three of them were in one police car together. He was in the back seat, so he did not see the traffic violations that led to the stop. Then his two partners are the ones that interacted with the people in the vehicle where he stood back by the police car and just watched the scene as sort of security officer. So his involvement was really just that as a watcher. And you're

certainly right, we certainly will be moving Rule 50. As I'm thinking now, I think that maybe we -- I'm not sure why we did not move to get him out, but, yes, you nailed on a particular issue, we do intend to try to get him out at some point in the case.

MR. WADIA: Your Honor, I will need to think about it, but I don't think they're going to get --

THE COURT: Hold on a moment. Ms. Wachs wanted to say something.

MS. WACHS: Briefly, toward the malicious prosecution claim. It moves almost parallel to malicious prosecution claim that Mr. Kunz is describing, and I think what's happening here is after the attempt to remove the malicious prosecution claim from the cases made, Mr. Wadia came with a new cause of action for this case.

THE COURT: Right.

MS. WACHS: And we think it's inappropriate reframing of what truly is a false arrest cause of action. The evidence that he claims was fabricated where the drugs were found is the issue of fact of this case is what the entire case is being litigated about. And we think when you analyze this under a malicious abuse of process claim, it fails for two basic reasons. When we look at the prongs under the malicious abuse of process, they're related by causality. What we have here with the forth and fifth prong is a way to sever that.

With the fourth, when we talk about whether or not jury would be likely to alter their minds because of the evidence that is being presented to them, we run up against *Rehberg* itself again. As the Court held in *Jovanovic* --

THE COURT: I'm sorry, you're talking about this as a malicious abuse of process.

MS. WACHS: Right.

THE COURT: It's usually described in the cases and in the complaint as the denial of a fair trial.

MS. WACHS: Right. Or the fabrication of evidence, yes.

What we're saying is the officer's testimony to the grand jury as to where they found the drugs is going to be covered by the absolute immunity confirmed by *Rehberg*, and, moreover, there was no deprivation of liberty that attached to the alleged fabrication of evidence itself other than the deprivation that plaintiff already experienced at the time he was put under arrest. Mr. Wadia's reply papers indicates that he believed the evidence to be fabricated such as it was in the hours subsequent to the arrest when the plaintiff was already -- when his liberty was already at question.

The evidence that he's talking about here is the probable cause for the arrest itself. It's not something that was created. And to the extent it he relies on the documents that the police made that they would have to in the course of

business that indicated where the drugs are found, to the extent that that's credited and every time there's an issue of fact for a false arrest claim, there will be a malicious abuse of process claim because of the concomitant documentation of the evidence.

That seems absurd to us that these two claims can no longer exist independently; that malicious abuse of process in effect subsumes all smaller claims when this case really should be tried on whether or not there was probable cause to arrest the plaintiff; not what happened subsequent to that arrest.

THE COURT: Why is that? It's one thing for officers to observe a crime and arrest people at the scene based upon what they have seen because they have observed a crime, and they have probable cause to believe that these people committed a crime, and they arrest these people.

If in fact that's wrong, and they don't have qualified immunity because they have gone way beyond the circumstances that would create probable cause, and any reasonable officer would know they didn't have probable cause to arrest these people, but they arrested the people, that's a constitutional tort. OK.

You say that's the gist. Don't worry if they then engage in anything else that some would think make this worse because it's always going to happen. It doesn't always happen. It does always happen that there are issues with respect to the

evidence that's created, for example, after the arrest. And as I was exploring with your colleague, that is different. It has a different impact. It has a different impact on the prosecution. It's one thing for officers to say one thing. It's a different thing for officers then to support the credibility of their statement by allegedly creating evidence.

MS. WACHS: Well, we're arguing that they weren't creating evidence; that the thing that led to the arrest is that nothing changed and I know that you're indicating that the photographs --

THE COURT: I know, but -- you know, on this motion I can't -- I can't assume that.

MR. KUNZ: I'm sorry, your Honor, I think like the situation that you're talking about would be similar to the fact pattern in I believe it's the *Ricciuti* case, where someone was arrested for assault. Subsequent to the arrest, a police officer said that the person made a racially disparaging comment, and that the racially disparaging comment was then related to the prosecutor. The crime was bumped up to a hate crime, and the prosecution continued. And in that case the Second Circuit said, yes, you can have a fabrication of evidence claim there because of the post arrest allegation that he made this comment which he denies, led to an additional deprivation of liberty; namely, an increase in bail and longer time in custody. So we get that. We totally understand that.

Our point is that this is not that situation, and that we don't believe there is anything post arrest in this case. The story of the arrest, "we saw the drugs in the car," is the exact same story that they took the photographs to be able to show visually is what was told to the grand jury --

THE COURT: No, but they're lying, right? They arrest. After they arrest, which may or may not be a tort here. After the arrest, the plaintiff is in custody. They all go back to the station house. Arrest is over. They're at the station house. The allegation is that to support their story -- and this may not be right; I'm just going on the plaintiff's allegation -- they create the photographs in order to support the prosecution. That's plainly post arrest alleged fabrication of evidence.

MR. KUNZ: I think you've run into the *Jovanovic*. As Ms. Wachs cited, the *Jovanovic* issue in that case where the Second Circuit said that in upholding Judge Crotty's dismissal of the case said that the only avenue by which the alleged fabrication could reach the jury was through the officer's grand jury testimony, and since they're absolutely immune for that testimony, citing to *Rehberg* and *Briscoe*, then the plaintiff cannot show causation, cannot show that the officers' lie caused any deprivation of liberty. So we think that that case, you know, extends and explains how the grand jury immunity applies in this sort of situation.

THE COURT: That's not completely true because in *Jovanovic*, yes, they upheld the decision below on the lack of causation based on how the evidence could have gotten to the grand jury, but they distinguished a prior case that dealt with a written statement which could have otherwise gotten to the grand jury. So, we have the written statements which could have gotten to the grand jury. We have the photographs which could have gotten to the grand jury.

It's not so clear to me, and maybe you have answers that certainly goes beyond this motion, that the only way the photographs could have -- and this goes beyond the Supreme Court case, it goes beyond *Jovanovic* -- the only way that the photographs could get to the grand jury is with testimony by the officers. I would have thought that real evidence, as opposed to simply demonstrative evidence, would get to the grand jury without testimony by the officer. I don't know what happened. I don't --

MR. KUNZ: We actually don't either because we don't have the grand jury minutes. Mr. Wadia we believe does have them. So I don't even, frankly, know if the photographs went to the grand jury.

THE COURT: OK. As I say, the Second Circuit distinguished one of its prior cases which dealt with written statements.

MR. KUNZ: Well, I understand what you're saying

there. I think that this case is more analogous to *Ricciuti* than in the situation where there's a written statement because, again, the only evidence that places the drugs there is not a sworn affidavit from an officer. It's the officer's testimony that he gave at the grand jury. And, you know, we've talked about the photograph issue. So we just say that. And I guess sort of the last observation I'll make --

THE COURT: You know, you say you don't have the grand jury minutes and the plaintiff does. It would surely be interesting -- I don't know the answer on this motion and I don't know whether the grand jury minutes are producible or not. I mean, there is plainly case law on the admissibility of the grand jury minutes and whether you can get the grand jury minutes. It certainly would be interesting to know whether the officers -- whether the photos went to the grand jury, whether the officers testified to the grand jury that these are photos of where the drugs were found.

MR. KUNZ: Right.

THE COURT: Or we created these photographs to show you, members of the grand jury, where we found the drugs, but we only, recreated this.

MR. KUNZ: Well, I think recreation might be a little bit strong description of what actually happened. I think it was simply more practical they had -- there's three of them, and they had three people under arrest, so they took them back

to the precinct and one of them drove the car back to the precinct with the drugs in the car where they had scene them and didn't dilly-dally at 4:00 a.m. on a street corner. So I don't think there was any recreation, but, you know, I understand those will be questions of fact.

THE COURT: Is that right? The testimony is that the officers -- one officer drove the car back with the drugs where they were rather than took the drugs into safekeeping and --

MR. KUNZ: I think what he said at his deposition is that he secured the drugs.

THE COURT: I took that to mean, you know, they drove the car back, but the drugs weren't sitting in the car. The officer had the drugs, and then at the station house physically put the drugs back where the officer said that they were. But, I mean, under the testimony as I recall reading it, they were physically moved. They were --

MR. KUNZ: Yes, you're correct, your Honor. You're correct. The detective says that or the officer says that he did remove them at some point and put them back.

"At some point he returned the evidence to the vehicle in which you found it, is that correct?

"Yes, for the purpose of taking photographs to indicate where in the vehicle the evidence was recovered."

I mean, look, when you hear the officer tell it, he just wants to be able to explain. He's anticipating a

situation where he is going to be asked how could you possibly have seen the drugs down on the side of the car from where you were standing, and he wants to be able to have a photograph saying, look, the bag is visible from my view, which is why he took the photograph.

So, like I said, we think that's a red herring. We think it is simply demonstrating what he saw visibly, and he would obviously have to testify about it.

THE COURT: Do you have many -- again, I always rely on the lawyers who deal with this all the time. Do you have many cases where the police recreate the scene and create photographs?

MR. KUNZ: In almost all the trials I've done, I've gone back to the scene with the officers and point to where things happened and take photographs of them, yes. We do that sometimes years after the fact. I did a trial with Judge Rakoff where we hired an animation specialist to recreate the scene digitally as our officers had explained it. So we think this is, frankly, a common practice. The fact that the officer did it himself in the hours after the arrest, I don't think really changes the analysis of what the photographs are at all.

The last thing I will say, the reason we think *Jovanovic* is insightful in this case is because the facts of that case are, frankly, quite similar to what we have here. It's an officer saying that they go to a location and they see

evidence, candles in an apartment and then the plaintiff says, "That's a lie. He never saw candles in my apartment." The officer presents that testimony to the grand jury, and the grand jury indicts. We think there are very, very similar situations and that's why we think --

THE COURT: But the officers here made written statements also prior to the grand jury that the plaintiff alleges were false, and *Jovanovic* explicitly distinguished the creation of a written statement from tolling.

MR. KUNZ: I'm not sure what the written statements that plaintiff is asserting they made are.

THE COURT: There was, I thought, written statements by the police in support of the complaint.

MR. KUNZ: Well, there's an arrest report which is created, and then there would have been the criminal complaint drafted by the district attorney but signed by a police officer; but I'm not sure if plaintiff attached those to his motion, and I'm not sure if they specifically address this issue of where the drugs were found. I think they just say we arrested plaintiff because he was in possession of drugs.

THE COURT: Yes, but those statements were alleged to be false, right? And they're different from the grand jury testimony. Different in the sense that they're not -- the officers are not entitled to absolute immunity for those --

MR. KUNZ: So what some of this reminds me of is the

Kalina case from the Supreme Court where the Washington State District Attorney signs an accusatory instrument that turns out contains false information. And the Supreme Court says that absolute immunity does not apply to that action because it was pre-prosecutorial. It was a typical police action in signing an accusatory instrument and allowed a false arrest claim to proceed.

So to the extent that we get into the officer's writings, our point is that to the extent our officers are writing down, you know, we arrested this guy because we found him in possession of drugs, that is simply restating their probable cause. That is simply putting down in a record that they can later look at to refresh their recollection about why they arrested this guy that there was probable cause to arrest.

We think that the malicious prosecution, denial of fair trial claim is something different. And we think when you look at the Second Circuit cases that allow the denial of fair trial claim to proceed, there's always something more. There's something additional that led to an additional deprivation of liberty that caused further damages, and we don't see that here.

THE COURT: Thank you. I appreciate the arguments. They're very thorough.

Your turn, Mr. Wadia.

MR. WADIA: Thank you, your Honor.

I will try to address all the points Mr. Kunz brought up. But before I do that, your Honor, last night while preparing for the conference, I found two other cases. I gave them to Mr. Kunz and Ms. Wachs this morning, and I would like to hand them up to your Honor.

The first is simply another decision by Judge Dearie. It's called *Jennifer Hewitt v. The City of New York*, in which he distinguishes a case in which the complaint of evidence was solely the testimony in the grand jury, and he distinguishes that from his earlier case *Sankar* where the malicious prosecution claim wasn't based on the testimony in the grand jury, and I would emphasize the words "based" and "testimony."

And the second case is *Tabaei v. New York City Health and Hospitals Corp*. That's a case out this court, your Honor, Judge Rakoff, which in a footnote -- you know, I will readily admit that it's dicta in this case, but in a footnote Judge Rakoff states, footnote 5: "Defendants' more recent argument that they are entitled to absolute immunity on the basis of the Supreme Court's recent decision in *Rehberg* completely misreads the decision. *Rehberg* held that a defendant cannot be held liable for testimony given in the grand jury. But plaintiff here does not rely on defendants' grand jury testimony in any material respect."

Now, your Honor, without the underlying papers, I agree that this is dicta. This is not a case that may be

relied on as precedent. But it's clear to me, at least, that the same issue has arisen. And what the defendants confuse here is the core holding of *Rehberg*; and, that is, that a malicious prosecution claim can't be based -- and I will put in the word solely -- solely on the testimony of a witness in the grand jury.

And, your Honor, to back up. In reading cases interpreting *Rehberg*, it's commonly said in the case law that *Rehberg* broke no new ground. *Rehberg* simply is an extension of the Court's earlier holding in *Briscoe*. And we don't hear the defendants, we don't hear the City of New York in any other cases saying that, "Well, you can't bring a malicious prosecution claim because there was a trial in which the officers testified because, therefore, they're immune from civil prosecution because they testified in front of a petit jury. They testified at a trial."

They are clearly immune under *Briscoe* from action brought solely on that testimony at trial. That's a distinction here. We see that distinction I think clearly in *Jovanovic*. And in that case, the claim that Mr. *Jovanovic* was denied his right to a fair trial because of testimony that the lead detective gave regarding candles was rejected precisely because that testimony, I think -- and I may be mistaken -- I think that testimony was before the petit jury, but it may have been before the grand jury, but he can't be held liable solely

for that testimony on that grounds

And when the Second Circuit was discussing a videotape, which presumably the plaintiff said was fabricated or improper and made prior to the case being indicted, the Court rejected his argument on different grounds saying that that videotape was not material.

And what we have here is -- if you want to talk about a question of materiality. If the drugs are in the car, if the jury believes the police officers said the drugs were found in the back seat of the car, then plaintiff's case fails.

If the jury believes that the plaintiff and his witnesses are truthful and that the drugs were found on the person of Mr. Alston, then the case succeeds. So, there can't be a more material issue than the one presented here.

I would like to talk about the photos as well since they have been brought up. I do have the grand jury testimony. Originally, I didn't provide it to the people as an oversight. And I thought I had then provide -- I'm sorry, not the people. To the defendants as an oversight, but I thought I had provided --

THE COURT: I know who you were referring to.

MR. WADIA: And I --

THE COURT: Have you now provided them?

MR. WADIA: I thought I had. If I hadn't, I most certainly will. And I probably have them. I probably can

access them on my phone, your Honor. It might take a minute.

THE COURT: It's all right.

MR. WADIA: My recollection is there is absolutely no testimony whatsoever about photographs. And the significance of the photographs, which I think your Honor has stated is that this is an extremely unusual occurrence. Purely anecdotally, your Honor, I have been practicing criminal law for 15 plus years, your Honor, and I have handled scores of drug cases, and I've tried several drug cases, and I have never ever seen the recreation, or whatever you want to call it, of evidence after the fact. The significance in this case is --

THE COURT: Not to interrupt you, but it seems to me to be different when the police do it, not under the supervision of lawyers or trial lawyers who are trying to plainly make a demonstration for purposes of trial, but, rather soon after the events to make those photographs, they invite misapprehension.

Go ahead.

MR. WADIA: Your Honor, I agree, they invite misapprehension, and I think at worst, if they are provided to the district attorney to show the district attorney, to demonstrate to the district attorney that these are where the drugs were found or these are the drugs as we found them, then that is in fact an actual fabrication of evidence in the way that the defendants used that term. They took evidence from

one place, put it in another and said "This is a fabrication of evidence." And even if that is not the case, it supports the plaintiff's theory that the officers lied, gave false information to the prosecutor as to where they found the drugs.

Now, I don't know, your Honor, and this was -- I don't know if it was uncovered in the depositions, I don't know if the -- and even if it were, I'm sure the officer would testify that, oh, no, he told the prosecutor he put the drugs there afterward. But the implication is that he wanted to support his false information that he provided to the prosecutor.

And that false information comes not only from the photographs but also from the arrest reports, from the criminal court complaint and from the statements that the officer made to the prosecutor.

If the officer told the prosecutor the drugs were found on the person on the coat of a person in the back seat, and nothing was found in the car, and we have no other evidence about that, the prosecutor would have declined to prosecute the case because they couldn't prove the case without the automobile presumption. So, it is painfully clear to me that the officers told the prosecutor that they found the drugs on the back seat and not on Mr. Alston's person, and that is false information.

And in countering defendant's motion to dismiss, I have commented on their use of the term fabricated evidence, as

if we can proceed on a right to fair trial claim unless somehow the police fabricated the evidence out of thin air.

I think placing evidence, even if it's telling the prosecutor that the evidence was found in one place and not another, and then lying in a police report and lying under penalties of prosecution in a complaint is clearly fabrication of evidence, and I think your Honor has so held earlier in a case this year.

THE COURT: Could I make something clear? When I ask questions at argument, they are not intended to in any way explain any sorts of findings of fact by me or assumptions by me about what the true facts are. I appreciate that the plaintiffs contentions are denied by the officers. The plaintiff says the arrest happened in one way, and the defendants say it's just not true. And by raising all these types of hypotheticals about what happened or didn't happen, I just don't want any one to assume that I've decided what way things happened.

This is a case that it's plain that there are hotly disputed issues of fact as to how the arrest, in fact, occurred, where the drugs were, how they were seized, from where, from whom, and the case -- I mean, the defendants agree that the issue of false arrest at least has to go to the jury. So, it is a quintessential case for the jury to decide what the facts really are. I say that now because you've been going on

for some time on your version of the case, and your proffers about how you believe these things really happened. And these are plainly questions of fact for the jury, and I wouldn't want anyone to think that I have any conclusions on issues that really have to be resolved by a jury.

MR. WADIA: Thank you, your Honor. And I apologize if I implicated that I thought you did have opinions on it, but there certainly are issues of fact that the plaintiff and the defendant don't agree on. I think those are -- because there are those issues of fact, very material issues of fact, this is why I believe that the defendant's summary judgment motion should be denied. There are these issues of fact. And that's undeniable, your Honor.

Then there are the issues of law, how to interpret *Rehberg*. And I think it is very clear that the plaintiff's claims would have to be based solely on the testimony of the witnesses in the grand jury in order for the malicious prosecution claim to be dismissed under *Rehberg*. I think that is the crux of the argument. And the footnote in *Rehberg*, it's plaintiff's contention, supports that.

I know the defendants said, "Well, those cases, one was a false arrest case, they weren't malicious prosecution case," but it's very clear -- and it's also I think clear from the case law in other circuits, including the Eleventh Circuit out of which *Rehberg* arose, in which the Supreme Court affirmed

the holding in *Rehberg*, and in *Rehberg* in the Eleventh Circuit the situation there was distinguished from a case almost identical to the case here where there was an allegation that officers placed drugs in the side compartment of a car and then passed that information on to prosecution.

And therein lies the difference, your Honor, and the cases cited by the defendants out of the Southern District in their initial briefings, your Honor, are all distinguishable on those grounds as well. First of all, those cases dealt with whether or not the plaintiff was entitled to have the grand jury minutes unsealed. Some did, and in the cases, including Judge Scheindlin's decision, the name of which escapes me for the moment, but it's clear which one that is, I believe in that case the plaintiff conceded the issue.

And in another one of the cases, it was clear that the case was based solely on the testimony in the grand jury. And that's the difference here. We are not relying on the grand jury testimony. We are not relying on the grand jury at all to support our claim.

Now, to the extent that I might argue theoretically that I can overcome probable cause because the officers -- I might overcome the presumption of probable cause because the officer, it's our allegation, perjured himself in the grand jury, I still think that's a valid basis on which to overcome the presumption of probable cause. However, it is further

plaintiff's contention that the probable cause in this case was procured by fraud and misrepresentation well prior to the grand jury. So I don't think the Court even needs to reach that argument.

And it's for that basis that I believe the malicious prosecution claim should be allowed to stand. I am at a loss, your Honor, really to understand how the right to fair trial claim -- which the defendants have called by almost every other name except right to fair trial claim -- I'm at a loss at how *Rehberg* controls in that arena. We are not basing our arguments on the testimony of the officers in the grand jury.

THE COURT: OK. Let me ask you another question.

MR. WADIA: Sure.

THE COURT: Should I dismiss Officer Matos?

MR. WADIA: Probably, your Honor. I am inclined to concede that Officer Matos should not be part of the case. The reason that -- if I may -- the reason that I didn't dismiss him, your Honor, is that in his deposition most of the answers were "I don't know; I don't remember." And, your Honor, I don't know if there will be more evidence that will implicate him at a trial, but as I stand here now, I think I would be inclined to dismiss Officer Matos. I'd like to give it just a bit more thought, your Honor, but that's the way I'm leading.

THE COURT: OK. I mean, if the defendants had made a motion, a very simple motion to dismiss Officer Matos under

Iqbal and *Twombly* because there are no allegations in the complaint against Officer Matos, that motion would have been granted because there are not.

MR. WADIA: Fair enough, your Honor. I will consent to that, your Honor.

THE COURT: All right. So the complaint against Officer Matos is dismissed on consent. I'm ready to decide the other motions now.

(Pause)

THE COURT: The defendants agree with that, right, the complaint against Officer Matos is dismissed?

MR. KUNZ: Yes, your Honor. Thank you.

THE COURT: On consent.

All right. I'm prepared to decide.

The plaintiff Jimmy Williams brings this action against New York City Police Department (NYPD) officers Richard Pengel, Daniel Ehrenreich and Carlos Matos (collectively, "the defendants") in their individual capacities. The plaintiff was driving a vehicle carrying two other passengers when Officer Pengel and Officer Ehrenreich stopped the vehicle and recovered narcotics during a subsequent search. In this action pursuant to 42 U.S.C. Section 1983, the plaintiff claims that his rights under the Fourth and Fourteenth Amendments of the United States Constitution were violated when he was arrested, detained, strip searched, charged and prosecuted for criminal possession

of a controlled substance.

The plaintiff's first cause of action alleges unreasonable search and seizure, false arrest and imprisonment, and malicious prosecution. The plaintiff has withdrawn his second cause of action which was against the City of New York. The plaintiff's third cause of action alleges denial of his constitutional right to a fair trial.

The defendants now bring two motions. The first motion is a motion for partial summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure on the plaintiff's malicious prosecution claim. The second motion is a motion to dismiss the plaintiff's fair trial claim for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, or, in the alternative, for summary judgment on that claim pursuant to Rule 56.

The standard for granting summary judgment is well established. "The Court shall grant summary judgment if the movant shows there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Federal Rule of Civil Procedure 56(a); see also *Celotex Corp. v. Catrett*, 477 U.S 317, 322-23 (1986); *Gallo v. Prudential Residential Servs., Ltd., P'ship*, 22 F.3d, 1219, 1223 (2d Cir. 1994). "The trial court's task at summary judgment motion stage of litigation is carefully limited to

discerning whether there are any genuine issues of material fact to be tried, not to deciding them. Its duty, in short, is confined at this point to issue a finding. It does not issue to extend resolution. *Gallo*, 22 F. 3d at 1224. The moving party bears the initial burden of "informing the district court of a basis for its motion" and identifying the matter that "it believes demonstrates the absence of a genuine issue of material fact." *Celotex*, 477 U.S. at 323. The substantive law governing the case will identify those facts that are material and "only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the settlement of *Anderson v. Limited Lobby, Inc.* 477 U.S. 242, 248 (1986).

In determining whether summary judgment is appropriate, a Court must resolve all ambiguities and/or all reasonable inferences against the moving party. See *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475, U.S. 574, 587 (1986). See also *Gallo*, 22 F.3d at 1223. Summary judgment is improper if there is any evidence in the record from any source from which a reasonable inference could be drawn in favor of the nonmoving party. See *Chambers v. TRM Copy Centers Corp.*, 43 F.3d 29, 37 (2d Cir. 1994). If the moving party meets its burden, the nonmoving party must produce evidence in the record and "may not rely simply on conclusory statements or on contentions that the affidavits supporting the motion are not

credible ..." *Ying Jing Gan v. City of New York*, 996 F.2d 522, 532 (2d Cir. 1993). See also *Scotto v. Almenas*, 143 F.3d 105, 114-15 (2d Cir. 1998) (collecting cases).

In deciding a motion to dismiss pursuant to Rule 12(b)(6), the allegations in the complaint are accepted as true and all reasonable inferences must be drawn in the plaintiff's favor. *McCarthy v. Dun & Bradstreet Corp.*, 482 F.3d 184, 191 (2d Cir. 2007). The Court's function on a motion to dismiss is "not to weigh the evidence that might be presented at a trial but merely to determine whether the complaint itself is legally sufficient." *Goldman v. Belden*, 754 F.2d 1059, 1067 (2d Cir. 1985). The Court should not dismiss the complaint if the plaintiff has stated "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the Court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 622, 678 (2009). While the Court should construe the factual allegations in the light most favorable to the plaintiff, "the tenet that a Court must accept as true all of the allegations contained in the complaint is inapplicable to legal conclusions." *Id.*.

When presented with a motion to dismiss pursuant to Rule 12(b)(6), the Court may consider documents that are

referenced in the complaint, documents that the plaintiff relied on in bringing suit, and that are either in the plaintiff's possession or that the plaintiff knew of when bringing suit, or matters of which judicial notice may be taken. See *Taylor v. Vt. Dep't of Educ.*, 313 F.3d 768, 776, (2d Cir. 2002); *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 153, (2d Cir. 2002).

The following facts are accepted as true for the purposes of these motions, unless otherwise indicated:

On April 10, 2009 at approximately 5:30 a.m., the plaintiff was parked in a Land Rover near the corner of Leno Avenue and West 128th Street in Manhattan. Larry Alston and Reginald Stephenson were also in the car with the plaintiff. An unmarked police vehicle pulled up behind the Land Rover. Officer Penel ordered Alston, Stephenson and the plaintiff to exit the car, which they did. At some point during the ensuing search, Officer Ehrenreich recovered crack cocaine and heroin. Alston, Stephenson and the plaintiff were placed under arrest and transported to the 32nd Precinct.

The items seized an their locations at the time of seizure were in dispute. The defendants maintain that Officer Ehrenreich recovered "14 bags of crack cocaine and 31 glassines of heroin from the floor behind the passenger seat of the car," that Officer Pengel recovered crack cocaine from Stephenson's jacket pocket, and that Officer Pengel recovered $583 from the

plaintiff's person and $233 from the driver's side door. (The Felony Complaint at 1-2.) By contrast, the plaintiff alleges that Officer Ehrenreich recovered crack cocaine and heroin concealed on Alston's person when he searched Alston on the street. (Amended complaint paragraph 18), and that no drugs or other contraband were found on the plaintiff's person or in the Land Rover. (Amended complaint paragraph 19).

At the precinct, the plaintiff was subjected to a strip search in front of Officer Pengel and another police officer. (Amended complaint paragraph 21.) The plaintiff alleges that he authorized a police search of the Land Rover but that the police found nothing during their search. (Amended complaint paragraph 22). The plaintiff alleges that after his arrest, in the precinct garage, Officer Ehrenreich placed the narcotics in the Land Rover and photographed them. (Amended complaint paragraph 24). These photographs were provided to the New York County District Attorney's office. (Amended complaint paragraph 25). The defendants maintain that Officer Ehrenreich, when photographing the evidence returned the narcotics to their initial location on the floorboard of the vehicle to recreate the view of where in the vehicle the evidence was recovered from. (Ehrenreich deposition at 68.) By contrast, the plaintiff alleges that Officer Ehrenreich, when photographing the evidence, placed the narcotics he recovered from Alston's person on the back seat of the Land

Rover. (Amended complaint paragraph 24.)

On April 11, 2009, the plaintiff was arraigned on a felony complaint charging him with criminal possession of a controlled substance in the third degree. (Amended complaint paragraph 26.) In that felony complaint, Officer Pengel stated that he observed Officer Ehrenreich recover "14 bags of crack cocaine and 31 glassines of heroin from the floor behind the passenger seat of the car which... Williams was driving and in which ...Alston and Stephenson were passengers." (Felony complaint at 1.)

The New York County District Attorney's office initiated prosecution of the plaintiff and presented the case against him to a grand jury. (Amended complaint paragraph 28.) Bail was set at the plaintiff's arraignment. (Amended complaint paragraph 31), and the plaintiff on, unable to have bail posted immediately, remained in custody until approximately April 21, 2009. (Amended complaint paragraph 32.) Sometime after his arraignment, the grand jury voted to indict the plaintiff for criminal possession of controlled substance in the third degree and criminal possession of a controlled substance in the fifth degree. (Amended complaint paragraph 33.) The plaintiff was arraigned on the indictment on May 20, 2009, and was detained until he could post bail the following day. (Amended complaint paragraph 34.)

On January 11, 2010, Alston pleaded guilty to

criminal possession of a controlled substance in the third degree. (Amended complaint paragraph 35.) During his allocution, Alston swore that the drugs were solely his. The substance didn't have anything to do with his co-defendants and it wasn't theirs at all. (Amended complaint paragraph 35) and (Alston plea allocution at 13). In addition, Stephenson pleaded guilty to criminal possession of a controlled substance in the seventh degree for the drugs that were discovered concealed on his body during a strip search at the precinct. (Amended complaint paragraph 36.)

On February 17, 2010, The court granted a motion by the district attorney to dismiss all of the charges against the plaintiff. (Amended complaint paragraph 37).

Complaint does not contain any specific factual allegations against defendant Carlos Matos and the parties have consented that the complaint against Officer Matos should be dismissed. Therefore, the complaint against Officer Matos is dismissed, which leaves the issues with respect to the remaining two defendants.

The plaintiff's first cause of action alleges unreasonable search and seizure, false arrest and imprisonment, and malicious prosecution. The defendants now move for partial summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, on the plaintiff's malicious prosecution claim.

To sustain a Section 1983 claim based on malicious prosecution, a plaintiff must demonstrate a seizure amounting to a Fourth Amendment violation and establish the elements of a malicious prosecution claim under state law. See *Manganiello v. City of New York*, 612 F.3d 149, 160-61 (2d Cir. 2010). See also *Murphy v. Lynn*, 118 F.3d 938, 944 (2d Cir. 1997).

In New York, to establish a claim for malicious prosecution, the plaintiff must show: "(1) the initiation or continuation of criminal proceedings against plaintiff; (2) Termination of the proceeding in plaintiff's favor; (3) lack of probable cause for commencing the proceeding; and (4) actual malice as a motivation for defendant's actions." *Manganiello*, 612 F.3d at 161 (citations and internal quotation marks omitted.) See also *Spencer v. Ellsworth*, No. 09 Civ. 3773, 2011 WL 1775963, at *4 (S.D.N.Y. May 10, 2011).

"The existence of probable cause is a complete defense to a claim of malicious prosecution ... and indictment by a grand jury creates a presumption of probable cause..." *Savino v. City of New York*, 331 F.3d 63, 72 (2d Cir. 2003). (Citing *Colon v. City of New York*, 455 N.E. 2d 1248, 1250 (N.Y. 1983); see also *Donnelly v. Morace*, 556 N.Y.S. 2d 605, 606 (App. Div. 1990)." ("A presumption that there was probable cause for the prosecution ... exists when the plaintiff was indicted or arrested by warrant.") (Citations omitted) *Rothstein v. Carriere*, 373 F.3d 275, 282-83 (2d Cir. 2004). "The

presumption may be overcome only by evidence establishing that the police witnesses have not made a complete and full statement of facts either to the grand jury or to the district attorney, that they have misrepresented or falsified evidence, that they have withheld evidence or otherwise acted in bad faith." *Rothstein*, 373 F.3d at 283 (Quoting *Colon*. 455 N.E.2d at 1250-51) (internal quotation marks omitted). See also *Alcantara v. City of New York*, 646 F. Supp. 2d 449, 460 (S.D.N.Y. 2009). "Thus, in order for a plaintiff to succeed in a malicious prosecution claim after having been indicted, 'he must establish that the indictment was produced by fraud, perjury, the suppression of evidence or other police conduct undertaken in bad faith.'" *Rothstein*, 373 F.3d at 283 (quoting *Colon*, 455 N.E.2d at 1251). The plaintiff must "establish what occurred in the grand jury, and... further establish that those circumstances warrant a finding of misconduct sufficient to erode the premise that the grand jury acts judicially." *Id.* at 284 (citations and internal quotations marks omitted). See also *Spencer*, 2011 WL 1775963 at *4.

In this case, the defendants argue that the plaintiff's malicious prosecution claim must be dismissed because the plaintiff was indicted and there is a resulting presumption that probable cause existed to prosecute the plaintiff. Citing *Rehberg v. Paulk*, 132 S.Ct. 1497 (2012), they further argue that the plaintiff cannot overcome the

presumption of probable cause because "a grand jury witness has absolute immunity from any Section 1983 claim based on the witness' testimony." *Id.* at 1506. According to the defendants, the courts in this circuit have uniformly held that where a plaintiff is indicted, there can be no malicious prosecution claim.

However, the defendants' arguments go beyond the specific holdings of *Rehberg* and *Jovanovic v. City of New York*, 10 Civ. 4398, 2012 WL 2337171. (2d Cir. June 20, 2012). The *Rehberg* Court itself noted:

"Of course, we do not suggest that absolute immunity extends to all activity that a witness conducts outside of the grand jury room. For example, we have accorded only qualified immunity to law enforcement officials who falsify affidavits, and fabricate evidence concerning an unsolved crime." *Rehberg*, 132 S. Ct. at 1507 n. 1 (citations omitted). Courts in this circuit have allowed malicious action to proceed against an officer who swore out a criminal complaint. See, for example, *Sankar v. City of New York*, 07 Civ. 4726, 2012 WL 1116984 (E.D.N.Y. Mar. 30, 2012.) In *Sankar*, the defendant's liability for malicious prosecution was not based on his grand jury testimony but on his other conduct "laying the ground work for an indictment,." and, therefore, the Court found that the defendants signing sworn criminal complaint was a sufficient basis for a malicious prosecution claim. *Sankar v. City of New*

York, 07 Civ. 4726, 2012 WL 2923236, at *3 (E.D.N.Y. July 18, 2012).

Moreover, the *Sankar* court specifically held that *Rehberg* was inapplicable to the facts of that case. "*Rehberg* did not alter controlling Second Circuit (and New York) law that an officer's filing of a sworn complaint is sufficient to satisfy the initiation prong of a malicious prosecution claim." *Id.* "If anything, *Rehberg* reinforces the distinction between one who simply testifies at a grand jury... and one... who 'sets the wheels of government in motion by instigating a legal action.'" *Id.* (citations omitted).

The *Sankar* defendants, like the defendants in this case "attempted to convert grand jury testimony into an all-purpose shield from malicious prosecution liability." but the *Sankar* Court found their argument to be unpersuasive because "the adoption of such a broad interpretation of *Rehberg* would allow any police officer -- regardless of the extent of their involvement in laying the groundwork for an indictment -- to escape liability merely by securing an appearance before a grand jury." *Id.*

Here, the plaintiff's allegations of police misconduct are not limited to defendants' grand jury testimony. The plaintiff also alleges that the defendants additionally provided false information in the felony complaint; namely, that the narcotics in question were recovered from inside the

car. (Amended complaint paragraphs 27-30). The plaintiff also alleges that Officer Ehrenreich placed the drugs in the back seat of the Land Rover after the Land Rover was brought to the precinct and then provided those photographs to the New York County District Attorney's office. (Amended complaint paragraphs 24-25). The defendants' liability for malicious prosecution is not based solely on the grand jury testimony but on the other conduct of the defendants "laying the groundwork for an indictment." *Sankar*, 2012 WL 2923236, at *3. There remains a genuine issue of material fact as to the location of the drugs at the time of the seizure and whether the defendants lacked probable cause to pursue a prosecution of the plaintiff. Therefore, the defendants' motion for partial summary judgment on the plaintiff's malicious prosecution claim is denied.

The plaintiff's third cause of action alleges the denial of his constitutional right to a fair trial. The defendants now move to dismiss the plaintiff's fair trial claim for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, or, in the alternative, for summary judgment on that claim pursuant to Rule 56.

"Pursuant to Section 1983 and prevailing case law, denial of a right to a fair trial is a separate and distinct cause of action." *Nibbs v. City of New York*, 800 F. Supp. 2d 574, 575 (S.D.N.Y. 2011). See generally *Ricciuti v. N.Y.C.*

Transit Auth., 124 F.3d 123, 130 (2d Cir. 1997). A plaintiff may state a Section 1983 fair trial claim by pleading that the defendants fabricated evidence and forwarded it to the prosecutors and that the fabricated evidence was "likely to influence a jury's decision." *Ricciuti*, 124 F.3d at 130. "Courts in this District have regularly found *Ricciuti* to stand for the proposition that a claim for denial of a right to a fair trial may be brought alongside one for malicious prosecution even where both are supported by the same evidence." *Nibbs*, 800 F. Supp. 2d at 576 (collected cases). Moreover, a Section 1983 fair trial claim does not require that a plaintiff actually go to trial; in *Ricciuti* itself, the charges against the plaintiff were dismissed before trial. See *Ricciuti*, 124 F.3d at 127; see also *Douglas v. City of New York*, 595 F. Supp. 2d 333, 346, (S.D.N.Y. 2009) ("The Second Circuit is permitted a claim under Section 1983 for violation of the right to a fair trial to proceed even where no trial took place.") The issue is whether the plaintiff has pleaded sufficient facts to state a Section 1983 fair trial claim.

In this case, the plaintiff asserts that the defendants forwarded to the prosecution false information about the location of the drugs at the time of seizure, and that the prosecution relied on this issue when presenting the case against the plaintiff to the grand jury. Accepting the allegations in the amended complaint as true, for the purposes

of this motion to dismiss, the plaintiff has pleaded sufficient facts to state a Section 1983 fair trial claim. The plaintiff alleges that Officer Ehrenreich recovered crack cocaine and heroin concealed on Alston's person when he searched Alston on the street (Amended complaint paragraph 18), and that no drugs or ora other contraband were found on the plaintiff's person or in the Land Rover (Amended complaint paragraph 19). The plaintiff then alleges that Officer Ehrenreich, when photographing the evidence, placed the narcotics he recovered from Alston's person on the back seat of the Land Rover (Amended complaint paragraph 24), and that these photographs were provided to the New York County District Attorney's office (Amended complaint paragraph 25).

The Plaintiff also alleges that the defendants provided false information in the felony complaint; namely, that the narcotics in question were recovered from inside the car, and that the prosecution relied on this information when presenting the case against the plaintiff to the grand jury (Amended complaint paragraph 27-30). In this way, the plaintiff has adequately pleaded that the defendants fabricated evidence and forwarded it to the prosecutors, and that the fabricated evidence was "likely to influence a jury's decision." *Ricciuti*, 124 F.3d at 130. Although the defendants against cite *Rehberg* to support their arguments that they have absolute immunity for the grand jury testimony, these arguments

go far beyond the holding of *Rehberg* and the courts in the Second Circuit that have considered *Rehberg*. The defendants rely on *Jovanovic*, but *Jovanovic* does not go as far as the defendants suggest. The basis for the alleged denial of a fair trial claim in *Jovanovic* was a claim that a police detective lied when he said that corroborative evidence was removed from the plaintiff's apartment between the time of the arrest and the execution of a search warrant. The Court of Appeals found that there was no causation because the only means by which the lie could reach the grand jury was through the detective's testimony, which was absolutely privileged under *Rehberg*. *Jovanovic* 2120 WL 2331171 at *2. However, the Court distinguished one of its prior cases where the statement at issue was a written statement. In this case, in addition to grand jury testimony, there was the written felony complaint and the alleged fabrication of physical evidence; namely, the photograph.

Because the plaintiff has indeed alleged sufficient facts to support a Section 1983 fair trial claim, the defendants' motion to dismiss, or, in the alternative, a summary judgment is denied.

The Court has considered all of the arguments of the parties. To the extent not specifically addressed above, the remaining arguments are either moot or without merit. For the foregoing reasons, the defendants' motions are denied except

that the complaint against Officer Matos is dismissed on consent.

The clerk is directed to close Docket Nos. 22 and 36.

So ordered.

All right. Discovery is complete. Yes?

MR. KUNZ: Yes, your Honor.

THE COURT: So, the final pretrial order, requests to charge, voir dire, motions in limine due January 11. Responses, objections due January 18. Ready for trial 48 hours notice? Yes?

MR. WADIA: Your Honor, just on the dates, I'm wondering if we can have -- most of this was already done. The joint pretrial order is done and motions in limine were done, but because of my schedule, the first week of January is just a little inconvenient. Obviously, if your Honor orders it, I'll have it done, but I'd rather a little more time.

THE COURT: Fine. I am sure the defendants will join in that. Yes?

MS. WACHS: Yes, your Honor.

THE COURT: How about January 25. Is that good? Joint pretrial, request to charge, voir dire.

MR. WADIA: Yes.

THE COURT: Motions in limine, responses, objections, February 1. Ready trial 48 hours notice February 21. And I will slot in at some point a final pretrial conference when I

get a better sense of when we will be going forward close to February 21. Right now it looks like I have a longer civil case that is going on at that time, but at least you will be ready by February 21. If there are any conflicts you have, you can bring them to my attention.

Does it make any sense to go to the magistrate judge to talk about the possibility of settlement at this point?

MR. WADIA: Your Honor, plaintiff has always been amenable to that. Just going back, I would add that we have already completed the joint pretrial order and motions in limine. Obviously, giving us this time, I don't know that there will be anything else, but I just wanted to put that on the table that that has been done and decided.

THE COURT: I'm sorry?

MR. WADIA: The joint pretrial order and the motions in limine were already done.

THE COURT: Submitted?

MR. WADIA: Submitted decided by your Honor.

THE COURT: OK.

MR. WADIA: Obviously, I am not suggesting that we shouldn't be allowed to bring anything else up. I just didn't know if your Honor remembered that because these motions arose out of the motions in limine.

THE COURT: OK. Thank you. So do you want me to shorten the schedule?

MR. WADIA: No. Thank you, your Honor.

THE COURT: No. I was serious about that.

MR. WADIA: No thank you.

THE COURT: The schedule is good?

MR. WADIA: The schedule is great with me, your Honor.

THE COURT: All right. The plaintiffs are willing to talk to the magistrate judge. You know, I'm perfectly happy to send you to the magistrate judge for the possibility of settlement.

MR. KUNZ: I don't think there is a possibility in this case, your Honor.

THE COURT: All right.

MR. KUNZ: There was at some point, but at this point my office is no pay on the case.

THE COURT: OK. I take your statement seriously, and I'm not going to make you go through a fruitless exercise just to use up all of your time. I would suggest to the plaintiff that you make a demand on the defendant. The defendant obviously has an obligation to take that back to client and give you a response. So please make a demand.

If there is any reason that you see as a result of that that you should talk to the magistrate judge, I'll send you to the magistrate judge; but if the City's position is still no pay, they're familiar with all of the testimony, it's plainly issues of fact. You've all heard the testimony. So

just write me a letter. And I normally send cases where the parties tell me that there is any possibility, but I am not going to send you if I am told by one side in good faith that there is no possibility. So you can test the waters. If you sense any possibility, just let me know.

MR. WADIA: Your Honor, we previously long ago made a demand and there has never been an offer. So, if anything, I would increase that demand, but I'm willing obviously to stand by it at this point. So I don't see the necessity to make -- if I made a new demand, it would be in a higher amount, let's put it that way, your Honor.

THE COURT: Go ahead. You can conduct settlement negotiations between the two of you in any way you want.

MR. WADIA: I understand.

THE COURT: I think realistically at this point your demands are going up. That may or may not cause the decision makers on the defendant's side to say, oh, well, we've got to look at this again. The demand is going up. Why is the demand going up?

On the other hand, that might be unrealistic. I don't know. I do not get in the middle of settlement discussions. If there is any willingness by the parties to consider any reasonable settlement, I will send you to the magistrate judge. Other than that, I'm here to try cases. So I will see you for trial.

When all of the motions are finally decided, as you all know, is a time where people usually get serious in the sense that posturing makes no sense because you know that you're going to go to trial soon. So notions like "It's important to maintain a strong position" or "we don't want to show weakness" are really quite irrelevant because you know a jury will answer these questions. And someone is not right.

The plaintiff says "I made a demand. All the motions have been decided. We're fairly close to trial," it might just end going up. If I made a demand now, it's going up.

The defendant says, "My office says this case is no pay." OK. So we have a defendant who says the chances we will lose and pay any money are zero. We're not willing to pay anything on this case. So we will spend the money to go to trial and use the services of two lawyers of our office at least and spend that money out of public funds defending the case, and we are confident that the result will be we don't have to pay anything. If we had to pay something, we would put that on the table because there's no reason not to.

The plaintiff says we have a demand. We made a demand. Our demand has gone up. We have a reasonable degree of confidence that we will collect a reasonable amount of money. It doesn't have to be a huge amount of money because they're bargaining against zero on the other side, but we're confident that we'll recover.

Each of you has clients. The defendant has people who make these decisions and who get judged on their ability to make these decisions and make these calculations. Then the case will be tried to the jury, and the jury will come out a with verdict, and the verdict will be what it is, and one of you will undoubtedly be wrong. And then you will have to live with that.

The plaintiff has a client. Defendant has trial counsel, as well as an obligation to consult with the people who make the settlement decisions. And someone will be wrong. The reason that cases often settle is that people appreciate that they are not infallible, and that it is just possible that they could be wrong. And so cases settle because people say, here are our risks and here are the chances, and having assessed what the potential recovery or liability is looking at the risks, we value this case for a certain amount. And, as I say, one side has made the calculations very wrongly. And the jury will eventually decide who that is unless you all decide to settle it before that.

As I say, there are no tactical reasons, concerns, whatever at this point. It comes down to shear calculations. So plaintiff should make a demand. Then they have to take it to the powers that be. I don't get involved in settlement discussions. I don't get involved in the back-and-forth. If you need someone to do it, the magistrate judge will do it. As

I've also said, I am here to try the case, and so I will.

OK. Anything else from me?

MR. WADIA: No.

THE COURT: Thank you.

I appreciated very much the briefing and the arguments. If the case goes to trial, I look forward to having you all try it.

(Adjourned)